

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA

RESPONDENT

v.

Criminal No. 4:07-CR-40003

Civil No. 4:08-CV-4097

MICHAEL E. BROWN

MOVANT

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 60)¹ filed herein by MICHAEL E. BROWN, (hereinafter referred to as “Movant”) an inmate confined in the Federal Bureau of Prisons. The United States of America (hereinafter referred to as “Respondent” or “United States”) has responded to the motion. (Doc. 68) The Motions were referred to the undersigned for findings of fact, conclusions of law and recommendations for the disposition of the case.

A. Background:

Movant was indicted on five criminal counts by the Federal Grand Jury for the Western District of Arkansas on May 9, 2007. He was arraigned on June 25, 2007, and entered a plea of not guilty to all counts. On September 26, 2007, the grand jury returned a six count Superseding Indictment against the Movant. Again he pled not guilty to all counts. Following several continuances of the trial setting, the Movant appeared before District Judge Harry F. Barnes on November 15, 2007, and, pursuant to a plea agreement with the United States, entered a plea of guilty to Count 3 of the Superseding Indictment. A pre-sentence report was ordered and prepared.

¹References to pleadings contained in the Court’s file will be to the docket number (Doc. ____).

Movant did not file any objections to the pre-sentence report. On May 23, 2008, following a hearing and the Court's grant of the Government's motion for downward departure, the Movant was sentenced to 121 months incarceration.

On October 16, 2008, he filed the instant motion to vacate sentence pursuant to 28 U.S.C. §2255. He alleged two grounds for relief. First, he alleged ineffective assistance of counsel in various particulars. Second, he alleged the Government had violated its plea agreement with him. This Court ordered a response and the Government responded and denied the allegations. The Court appointed Mr. Craig L. Henry to represent Movant in this §2255 proceeding.² On October 6, 2009, the Court conducted an evidentiary hearing in this matter.

B. Discussion:

Prior to the evidentiary hearing the Court granted Movant's request for subpoena and directed the appearance of Movant's trial counsel Rick Shumaker. Mr. Shumaker appeared on October 6, 2009 and was prepared to testify if needed. Movant, through counsel informed the Court at the start of the hearing that he wished to withdraw his motion to vacate sentence. Movant then testified in response to counsel's questions and affirmed that it was his desire to withdraw the motion to vacate sentence. He indicated he understood he would not be able to refile the motion at a later date. The parties then waived objections to this Report and Recommendation.

E. Recommendation:

Accordingly, based on the foregoing, it is recommended the Movant's oral request to withdraw Motion to Vacate Sentence be **GRANTED**, and that the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 60) be **DENIED** as withdrawn.

²With the consent of the Movant, Mr. Matt Golden appeared on October 6, 2009, at the evidentiary hearing on behalf of Mr. Henry.

The parties have waived their right to file written objections pursuant to 28 U.S.C. § 636(b)(1), and the Court may act on this recommendation.

DATED this 6th day of October, 2009.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE